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Hearing Date: April 17, 2024  
Hearing Time: 10:30 a.m.

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

In re,

CELL-NIQUE CORPORATION,

Debtor.

Chapter 11

Case No. 23-10815-REL

**RESPONSE BY BERKSHIRE BANK IN SUPPORT OF THE UNITED STATES  
TRUSTEE’S MOTION TO DISMISS CASE UNDER 11 U.S.C. § 1112(b)**

Berkshire Bank (“**Berkshire**”), through its attorneys, Nolan Heller Kauffman LLP, states as follows in support of the United States Trustee’s Motion to Dismiss under 11 U.S.C. § 1112(b) (the “**Motion**”) (ECF No. 108):

1. As the Court is aware, Berkshire is a pre-petition secured creditor of Cell-Nique Corporation (the “**Debtor**”), having a perfected security interest in and lien on all personal property and business assets of the Debtor.

2. In addition to the grounds for dismissal or conversion set forth in the Motion,<sup>1</sup> this case should be dismissed for “cause” pursuant to 11 U.S.C. § 1112(b)(4)(A), (B) and (D).

3. As noted in the Motion, 11 U.S.C. § 1112(b)(1) states, in pertinent part, that the court shall convert or dismiss a Chapter 11 case upon a showing of cause. (Emphasis added). Pursuant to 11 U.S.C. § 1112(b)(4), “cause” includes but is not limited to: “(A) substantial or

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<sup>1</sup> For the reasons set forth herein, Berkshire also supports the Motion to Dismiss filed by the Internal Revenue Service. (ECF No. 110).

continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; (B) gross mismanagement of the estate...[and] (D) unauthorized use of cash collateral substantially harmful to 1 or more creditors.”

4. It is respectfully submitted that cause exists to dismiss the instant case under 11 U.S.C. § 1112(b)(4)(A) because the Debtor’s Monthly Operating Reports evidence substantial monthly operating losses and the Debtor has not proposed a Plan of Reorganization in the approximately eight (8) months that this case has been pending. Specifically, the Debtor’s Monthly Operating Report for the period ending February 29, 2024 (ECF No. 106) reported a monthly loss of -\$43,250 and a cumulative loss since the petition date of -\$230,182. Although the Debtor has recently circulated a proposed Plan “term sheet” and budget to Berkshire, it is respectfully submitted that the Debtor’s proposal set forth therein is neither feasible nor proposed in good faith.

5. Further cause exists to dismiss this case under § 1112(b)(4)(B) because the Debtor continues to use non-DIP bank accounts, including various deposit accounts at Berkshire. (*See* ECF No. 106, pgs. 29 – 80). The Debtor has been notified on numerous occasions that Berkshire is not a depository bank authorized by the United States Trustee for DIP accounts. A review of the Debtor’s Berkshire deposit account statements also reveals continuing intercompany transfers between the Debtor and non-debtor entities. (*Id.*).

6. Finally, cause exists to dismiss this case under 11 U.S.C. § 1112(b)(4)(D) because the Debtor has failed to sign and return to Berkshire the previous two (2) proposed Stipulations and Interim Orders for Use of Cash Collateral that were provided to the Debtor and its counsel by Berkshire’s counsel. Accordingly, no Stipulation and Interim Order presently exists for the Debtor’s continued use of Berkshire’s cash collateral, including the Debtor’s accounts receivable and proceeds thereof.

7. It is respectfully submitted that dismissal, rather than conversion, would be in the best interest of creditors and the estate in this case.

Berkshire Bank respectfully submits that the foregoing, together with the grounds established in the U.S. Trustee's Motion, demonstrate that dismissal is appropriate in this case.

Dated: April 15, 2024  
Albany, New York

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